

From: Bruce Umbaugh
To: Microsoft ATR
Date: 1/28/02 6:18pm
Subject: Microsoft Settlement.

I wish to comment on the proposed settlement of anti-trust litigation United States of America versus Microsoft.

First, I am surprised that the government would agree to terms that do not penalize Microsoft for its past conduct. Having been found in violation of federal law, with a record of apparent disdain for proceedings against it, and as I understand the facts manifestly having violated the strictures of previous such agreements, I would think that Microsoft would be expected to pay some penalty for its corporate misdeeds. Not to penalize Microsoft for its conduct seems unjust, unfair, and I am sure quite unlike the results individual citizens would expect if found similarly to have violated federal law.

Moreover, I believe that this result undercuts respect for law generally in the population ("it only matters how much money you have," people will say) and undercuts respect for anti-trust law in the corporate world in particular. I think that Microsoft should have to pay a penalty for its years of misconduct and apparent bad faith in dealings with the government, with manufacturers, competitors and those who license Microsoft products, and with consumers and citizens.

Third, in addition to the need for a penalty, I see a need for some structural remedy, not just an agreement about future conduct. Given the particulars of this agreement, as I understand it, Microsoft has far too much latitude to avoid doing the right thing while still arguably conforming to the consent agreement. Microsoft is at liberty, largely at its own discretion, to withhold information crucial to interoperability from competitors it deems "inauthentic." Microsoft can, as I understand the agreement proposed, withhold information from those working to make software available under the GPL as threatening Microsoft's intellectual property. What little oversight is called for is to happen largely in secret, at places of Microsoft's choosing, under terms Microsoft sets, and conducted in part by parties appointed by Microsoft. With what I understand about Microsoft's past record in these matters, it is hard to expect that Microsoft will be a "good citizen" in its future dealings and behavior. To my mind, this makes structural rather than conduct remedies necessary.

Finally, if this agreement is settled largely as proposed, and if the state attorneys general fail to sustain their action against Microsoft--one of the richest corporations we might ever know, able to carry on litigation indefinitely far into the future--what might we reasonably expect? If the future is like the past, we should expect Microsoft to try to leverage its desktop-operating-system monopoly into a server operating system monopoly, to try to disenfranchise on the Net content providers not partnering with

or otherwise paying tribute to Microsoft through its .Net and Hailstorm undertakings, to try to stigmatize competitors in the media display space by limiting interoperability and exploiting its existing monopolies and choke points. Some action on integration of Windows Media Player would help here. Action on browser technology would help here. Any plausible action on "middleware" would benefit consumers and benefit competition. Without such remedies--ones that do not require continual maintenance and political will on the part of overseers and that do not require the goodness and ongoing acquiescence of Microsoft--there is every reason to think that the result will be something like an Internet controlled by Microsoft.

An Internet world controlled by Microsoft--or any similar entity--is a frightening prospect. The Internet became so amazingly valuable because it has been, in the words of the Court of Appeals in the Communications Decency Act decision, "the most democratic medium the world has known." The "gift economy" that drove the development of the Internet, and in which the real value of the Net still resides for many users (whether they know it or not), would be badly threatened if Microsoft could extend its monopoly to control media distribution, for example, or to control authentication and personal identification through its new Passports strategy.

I wrote about these issues for a popular audience when this antitrust litigation was at an early stage: "So it's up to consumers like us, and the government that represents us. It's up to us to prevent what has been history's most democratic medium from being trivialized and demeaned. It's up to us to keep the Web from going down the same path as TV itself." ("Tailoring the Web for Profit," St. Louis Post-Dispatch, June 15, 1998, and Computer underground Digest, June 1998.
<http://www.webster.edu/~bumbaugh/net/tailorweb.html>)

I hope that my government will do better than has been proposed. I hope for a good outcome in this case, for justice that punishes the evildoer and takes away its ill-gotten gains, for remedies that will send the right message to individuals and corporations considering misconduct, and for remedies that will benefit all of us today and future generations.

Thank you for the opportunity to comment.

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